In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 2

WILLIAM SCHNEIDERMAN

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

Pursuant to permission granted by this Court, this brief is filed in response to several contentions made in the course of oral argument and made by petitioner in his reply brief filed immediately before oral argument. Many of petitioner's contentions urged in his reply brief and at oral argument have already been fully discussed in the Government's main brief and require no further reply. Nevertheless certain new contentions relating to the evidence in the record are made for the first time and are, we submit, without merit.

1. Petitioner raises two technical objections to the Government's use in its brief and in its oral

argument of certain material embodied in the original exhibits. These exhibits consist of books, pamphlets and other documents, listed at pages 145 to 151 of our main brief, and comprising official constitutions, programs and reports, and literature relating to the Communist program, activities, tactics and principles. In general petitioner attacks the use of these exhibits (Government Exhibits 4 to 26, inclusive) on the ground that they are not in the printed record (reply brief, p. 3). In Appendix II of his reply brief, petitioner further suggests that since these exhibits do not appear in the printed record they are therefore not a part of the record. It was apparently upon the basis of this contention that petitioner at the close of oral argument urged that the Government's case rested entirely upon evidence not in the record.

We think that petitioner's point is based upon a misunderstanding of the situation. The record seems plainly to show that the original exhibits are a part of the record, and that the excerpts printed in the transcript do not comprise the sole material on which reliance may be had.[1] The original "Request for and Designation of Record" filed on August 23, 1940, by petitioner's own

[1] Petitioner's present insistence that the Government may rely only on the brief excerpts from the exhibits which were read into the record and form a part of the printed transcript is inconsistent with his argument that the Government has rested upon quotations wrested from their context.

counsel,[2] but not referred to in petitioner's reply brief (see p. 31, note), shows that petitioner designated as part of the record on appeal to be [redacted] in the court below "one copy of all exhibits in evidence or offered for identification" (R. 59). In response to this designation, Michael J. Roche, Judge of the District Court, ordered the Clerk to "transmit to and deposit with the Clerk of the United States Circuit Court of Appeals all original exhibits introduced in evidence or for identification in the trial of the above-entitled matter" (R. 60).

Subsequent to this designation of the record, the United States Attorney filed a designation (R. 902–903) stating that petitioner had failed to file or serve upon the Government a designation of the record *to be printed;* the United States Attorney therefore made his own designation of the portion of the record to be printed. This designation did not include original exhibits 4 to 26 except for the excerpts now found in the transcript. On the following day, October 19, 1940, petitioner filed a second designation of the record identical to its designation of August 23, 1940, except for the omission of the designation of the original exhibits (R. 903–904).

The original exhibits were before the court below and were considered by it as a part of the record. The court below expressly referred (R.

[2] See Rule 75 (a) of the Federal Rules of Civil Procedure.

916) to the fact that the evidence consisted of "books, pamphlets, and writings." Further the certificate of the clerk of the court below (R. 921) shows that the two volumes of transcript as well as the original exhibits were considered to comprise the record of the court below. This is further established by the fact that the clerk of the court below in response to the order allowing certiorari transmitted to the Clerk of this Court all of the original exhibits.[2] In addition a certificate to the original exhibits, filed by the clerk of the court below in the office of the Clerk of this Court on October 25, 1941, certified that all of the original exhibits introduced both by the Government and by the petitioner at the trial "are the exhibits and all of the exhibits filed in my office" in the cause.

In these circumstances we submit that the record shows that the original exhibits were before the court below and are properly a part of the record in this Court. We think that petitioner has confused the rules relating to the transcript of the record with the rules relating to original exhibits. We are informed that it has been the uniform practice of this Court to distinguish between the requirements for inclusion in the printed record and the requirements relating to original

[2] A copy of the letter addressed to the Clerk of this Court was received by the Department of Justice on October 27, 1941, and is in the Department of Justice file.

exhibits. For like reasons, we think that petitioner has mistaken the effect of his second designation of the record in the court below and of Rule 19, paragraph 6, of the Rules of the United States Circuit Court of Appeals for the Ninth Circuit. Both the second designations and the rule seem clearly to relate only to the portion of the record *to be printed* and not to what is to constitute the entire record, which had already been designated by petitioner (R. 59). While Rule 19, paragraph 6, provides that if the parties shall designate the record, "the Clerk shall print those parts only; and the Court shall consider nothing but those parts of the record * * *", it is obvious that this rule does not apply in the case of "models, diagrams, and exhibits of material forming part of the evidence."[4] See Rule 18 of the court below. It would seem clear that the court below did not intend by its rule to preclude, and did not in fact preclude, from its consideration all materials which are not printed but which had been designated, as here. Indeed, as pointed out above, it appears both from the decision of the

[4] It should be noted that the designation of the record by the United States Attorney was a designation for *printing* only (R. 902). Petitioner's second designation (R. 903–904) in response to the United States Attorney's designation, was undoubtedly regarded also as a designation for printing, while its first designation (R. 59) was plainly a designation of the *record* on appeal (without regard to printing) pursuant to Rule 75 (a) of the Federal Rules of Civil Procedure.

court below and from the certificates of its clerk that in fact the original exhibits in this case were before the court and were considered by it.

We cannot emphasize too strongly, as suggested in the Government's oral argument, the importance of considering not excerpts alone but the entire exhibits upon which both courts below based their decisions (R. 43–44, 916). Indeed, consideration of the full exhibits is necessary for a fair understanding of the contentions of both parties.

Petitioner also urged at oral argument and in his reply brief (pp. 4, 27) that Exhibit 26, "Statutes, Theses and Conditions of Admission to the Communist International," was not in evidence in the case at all. This exhibit was marked as a Government's exhibit for identification in the earlier stages of the hearing before the District Court (R. 274). The consistent practice of counsel of thereafter placing the exhibit in evidence, followed in respect of all other exhibits, appears not to have been followed. However, the exhibit was treated by petitioner's own counsel as in evidence at the trial. While petitioner states in his reply brief (p. 4) that "Government counsel at the trial asked petitioner if he knew the document, and, in so doing, prefaced his statement with the statement 'Now, referring to Exhibit Number 26 in evidence * * *'" the record establishes that this statement was made *by peti-*

tioner's counsel,[5] in the course of his examination of petitioner. It therefore plainly appears that both parties accepted Exhibit 26 as in evidence, and indeed had petitioner's counsel not made the statement above quoted, treating the exhibit as in evidence, the omission to do more undoubtedly would not have occurred. In these circumstances, it is clear that the Exhibit may be treated as in evidence.

Wright v. *Roseberry,* 81 Cal. 87, 92, (1889);

O'Callaghan v. *Bode,* 84 Cal. 489, 497 (1890).

2. Petitioner in his oral argument and in his reply brief (pp. 3, 29–30) lays great stress upon the Government's use of literature published subsequent to 1927. The dates of the publication of literature were set out fully in the Government's main brief (pp. 145–151) and were stressed further where relevant in its main brief (see pp. 30, note 15; 35, 47, note 32; 84–85) and in its oral argument. Chief among the documents published subsequent to 1927 relied on by the Government are "The Platform of the Class Struggle" (Ex-

[5] At p. 829 of the Record, Mr. Andersen, petitioner's counsel at the hearing (R. 62) resumed examination of petitioner. He questioned petitioner concerning a number of exhibits and in the course of such questioning, at p. 835 of the Record, made the statement referred to in the text. It should be noted that this statement made by petitioner's counsel concerning Exhibit 26 was identical to his statements made in discussing other exhibits which had in fact been introduced (see R. 833, 834, 836).

hibit 15), "Acceptance Speeches" (Exhibit 14), "Programme of the Communist International" (Exhibit 6), and "Program of the Young Communist International" (Exhibit 10). Each of these constituted official literature, officially distributed by the Party and were either published in 1928 or adopted as programs in that year (see main brief, pp. 147–149). Because of their nature, and considered with all the evidence, it is plain that they were statements of principles, programs, and policies of a period shortly before their publication or formal adoption. In these circumstances, as we pointed out in our main brief, we think that they are sufficiently contemporaneous with petitioner's naturalization in 1927 to be probative of the Party's principles and petitioner's views during the relevant period. They are a part of a continuous program which was then of a single pattern.

3. Petitioner makes a number of other contentions relating to the probative value of certain of the exhibits relied upon by the Government in its brief and in its oral argument. Thus, petitioner contends (Reply Brief p. 28) that the "Program and Constitution of the Workers Party of America" was "never finally adopted by the Party." Plainly, however, petitioner's contention is based upon the broad proposition urged at the trial in the District Court that the 1938 Constitution of the Communist Party (Exhibit 5) is the only official expression of the principles of the Party

and that prior to that constitution the Party had no official written program.[6] This argument has been discussed fully at pages 74–76 of the Government's main brief. Petitioner in his own reply brief (p. 27) refers to this exhibit as having been "*adopted* at National Convention in 1921 and amended at National Convention in December 1923 and January 1924", yet in oral argument criticized the Government for having stated just th... [Italics supplied.] At most the issue raised is one only of petitioner's credibility—of the relative force of petitioner's own testimony concerning a Party program [7] and the showing on the face of these exhibits that they comprised the programs and official statements of the Party (see, also, R. 275–276). And it should be noted that the very position which petitioner held in the Workers Party of America—City Central Secretary in Los Angeles (R. 92, 175)—during the effective date of this Constitution was one which was expressly created by Article V, Section 5 (R. 302), thereof. This would seem plainly to indicate that the Party was operating under the Constitution and that petitioner knew it.

In addition petitioner has stressed in his oral argument and in his reply brief (pp. 26–30) that he was not familiar with many of the documents

[6] See R. 364–365, 836–839.

[7] The record shows that petitioner's testimony that Exhibit 27 was never officially adopted was itself based on hearsay (R. 837).

relied upon by the Government.[8] This issue again raises at most a question of credibility which was plainly resolved against him by the District Court. Petitioner unequivocally testified that during all the period when he was a member of the Young Workers League, the Young Workers Party, the Young Workers Communist League, the Young Communist League, the Workers Party, the Workers Communist Party and the Communist Party of the United States of America, he subscribed to the principles of those parties (R. 102). Indeed, petitioner in his reply brief (p. 24) states "All that can be said of him [petitioner] and all that is said of him is that he was a Communist, believing in the general social and political theses of that party." In these circumstances, he can hardly object to a resort to a reading of the documents showin those "social and political theses." His affirmative adherence to these principles alone not only warrants but requires reference to the officially distributed, officially published literature of those organizations and their official programs and statements of principles and tactics. The significance of his subscription to the principles can be measured only by ascertainment of and examination of those expressed principles. There can be no other

[8] Petitioner's familiarity with the literature was discussed in detail at pages 145–151 of our main brief, and the propriety of attributing such documents to him was discussed at pages 23–28.

method of ascertaining what the principles to which the petitioner testified he subscribed were in fact. In the light of his express adherence to those principles any subsequent disavowal through a later claim that he did not remember the documents or was not familiar with them is scarcely credible, for these are the very principles of the parties to which he admitted he subscribed.[9]

[9] Petitioner's suggestion (reply brief, p. 28) that the "Program and Constitution of the Workers Party of America" (Exhibit 27), adopted in 1921 and amended in December 1923 and January 1924, and the "Second Year of the Workers Party in America" (Exhibit 13), December 1923 and January 1924, cannot be attributed to him since he did not join the Workers Party until later in 1924 or 1925 (R. 91, 860, 884), is without force. It would seem even more proper to attribute to petitioner programs which had been crystallized and made public shortly *prior* to his joining than to attribute those formulated and adopted during his membership, since in the former case the program was before petitioner at the time he made his choice in joining. And in any event in 1923 and 1924 petitioner was a member of the Young Workers League (R. 86–87, 90, 860), which, as we have described in our main brief (p. 141), was simply the youth branch of the Communist International; and of the Workers Party; and in fact it sent delegates to the latter's conventions (Exhibit 13, p. 123, R. 248). Petitioner further suggests (Reply Brief, pp. 10, 27) that "ABC of Communism" (Exhibit 16) is of no evidentiary value since it "never accepted as an authorized version of Communism" and was withdrawn from use in, and barred from, the Party's schools, and its editors were ultimately expelled. But whatever the ultimate disposition of the book, the record shows that it was published by the Party between 1920 and 1924 (cover, title page), was officially circulated by the Party (R. 269), was expressly designed for study class purposes (Exhibit 16, pp. 5–6), and was used in 1924 and 1925 as a text book in the

Concerning "Manifesto of the Communist Party" (Exhibit 7), petitioner insists (reply brief p. 26) that Schneiderman's subscription to its principles was limited to their application to the period in which they were written and the country about which they were written. But petitioner explicitly testified (R. 103) in response to the question whether during the relevant period he believed in and advocated the principles of Marx that he "believed in the essential correctness of the Marx theory as applied by the Communist party of the United States." And it is to be noted that the very document which petitioner insists represents the only program of the Communist Party of the United States of America, and the true interpretation of his principles—the 1938 Constitution of the Party—itself expressly embodies the principles of Marx and Engels and applied them to the "establishment of socialism [communism]" in the United States (R. 15; cf. 898).

4. In response to a question put by Mr. Justice Black, the Solicitor General stated that the District Court made no finding that petitioner, at the time of his naturalization, did not intend to renounce and abjure allegiance and fidelity to any foreign prince, potentate, state, or sovereignty. The response was in error. The District Court did

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Workers Party study classes and in instructing teachers (R. 185, 186, 193, 194, 202). Thus it plainly appears that it was officially accepted and used during the relevant period.

so find (R. 51). We have urged the less specific position (see main brief, pp. 29–45) that through his rigid adherence and unremitting political loyalty to the Communist Party and the Third International, and his complete subjection to the orders and political discipline of those organizations, his fidelity was exhausted and he could have none left for the United States. The evidence relating to petitioner's affirmative allegiance to the Communist Party and the Third International is simply the converse of the evidence (main brief, pp. 45–52) of his lack of allegiance to the United States.

5. Petitioner has strongly emphasized in his oral argument and in his reply brief (p. 24) his contention that Congress did not until 1940 make Communism a bar to naturalization, and had expressly refused to do so. Accordingly, petitioner insists that if this Court were to affirm the judgment of the court below, this Court would be guilty of "judicial legislation." But as was pointed out in our main brief (pp. 121–125), the legislative history clearly does not warrant the conclusion that, by failing to specify Communism as a bar, Congress thereby intended to permit their admission to citizenship. The bills specifying Communism as a disqualification, which did not become law, related only to exclusion and deportation, not to naturalization. And in any event, the very ground of opposition to these bills

was that they "accomplish practically nothing more than can be and is being accomplished under the present law." H. Rep. No. 1023, Pt. 2, p. 2. From the earliest Naturalization Act, Congress has traditionally imposed broad and general requirements; that Congress did not thereby intend to permit naturalization of members of specific groups was established as early as 1795, when Congress made it plain that the requirement of attachment barred such diverse groups as "Aristocrats," "Monarchists," "Anarchists," and "Jacobins"—the latter the forerunners of Communists—although those groups were not specified in the Act. 4 Annals of Cong., 3d Cong., 1793–1795, p. 1021–1022, 1031–1032; see Government's main brief, pp. 108–109, 122–123.

CONCLUSION

Petitioner's contentions raised in his reply brief are without merit. For the reasons stated in the Government's brief and at the oral argument, the judgment below should be affirmed.

Respectfully submitted.

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U. S. GOVERNMENT PRINTING OFFICE: 1943